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No. 90-1947

Supreme Court, U.S.
FILED
NOV 27 1991
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN K. YEE, *et al.*,
Petitioners,

v.

THE CITY OF ESCONDIDO,
Respondent.

On a Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

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BRIEF AMICI CURIAE FOR RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL MULTI HOUSING COUNCIL, AND CALIFORNIA HOUSING COUNCIL IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does a municipal rent control ordinance that prevents mobile home park owners from raising rents without governmental approval, in conjunction with state statutes that severely restrict the rights of such owners to evict current tenants or refuse to accept new ones, effect a "permanent physical occupation" of those owners' property within the meaning of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)?

2. If such an ordinance, in conjunction with the applicable state statutes, takes property from the landlord, and, at the same time, fails to protect the interests of the tenants that it was designed to serve, does the ordinance violate the Due Process Clause?

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This brief is filed on behalf of the Rent Stabilization Association of New York City, Inc., the National Association of Home Builders, the National Multi Housing Council, and the California Housing Council.*

INTERESTS OF THE AMICI

The Rent Stabilization Association of New York City, Inc. is an association of landlords and real estate operators in the Greater New York area, with 20,000 members who own approximately 650,000 units of housing.

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* Consent from counsel for all parties has been filed with the Clerk of this Court.

The National Association of Home Builders represents 153,000 builder and associate members organized into approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers.

The National Multi Housing Council, based in Washington, D.C., represents the interests of the larger and most respected firms in the country participating in the multifamily rental housing industry. Its members are engaged in all aspects of the development and operation of rental housing, including the ownership, building, financing, management and conversion to condominium of such properties.

The California Housing Council ("CHC") is a nonprofit association whose members are the larger owners, managers and developers of residential rental property in California. Since its formation in 1975, CHC has been actively involved in rent control issues at the local, state, and federal levels.

These organizations, and their members, have a clear and definite interest in the questions raised in this case, namely (1) whether rent control ordinances such as those involved in this case authorize "permanent physical occupation" of a landlord's property and (2) whether such ordinances violate the Due Process Clause.

STATEMENT

California's Mobilehome Residency Law, Cal.Civ.Code §§ 798-798.87 (West Supp. 1991) ("the Mobilehome Residency Law"), which was enacted in 1978, regulates many aspects of the relationship between the owners of mobile home parks and the owners of mobile homes (tenants) who rent spaces in the parks upon which to place their

mobile homes.[1] Among other things, the Mobilehome Residency Law provides tenants (in the language used by the legislature) with unique "protection from actual or constructive eviction. . . ." § 798.55. Park owners may terminate a tenancy only for certain reasons specified in the Mobilehome Residency Law. These include, among others, failure to pay the rent. § 798.56(e)(1).[2] It is further provided that if a tenant sells his mobile home to a third party, the park owner must accept the purchaser as a tenant "if the purchaser has the financial ability to pay the rent and charges of the park," unless the park owner "reasonably determines that, based on the purchaser's prior tenancies, he or she will not comply with the rules and regulations of the park." § 798.74(a).

In 1988, voters in the City of Escondido ("the City") passed an initiative measure which enacted a mobile home rent control ordinance ("the Ordinance"). Escondido, Cal., Municipal Code art. V, §§ 29-101 to 29-108 (1988).[3] The Ordinance provides, in pertinent part, that mobile home park owners shall not charge "rent for a mobile home space exceeding the rent for said space on January 1, 1986." § 29-103.[4] If the park owner wishes

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[1] The pertinent sections of the Mobilehome Residency Law have been reproduced in Appendix D to the Petition for Certiorari.

[2] Other reasons for termination include failure to comply with state and local laws relating to mobile homes, conduct by the tenant which constitutes a "substantial annoyance" to others, conviction for certain crimes committed within the mobile home park, failure to comply with "reasonable" rules of the park that are contained in the rental agreement, condemnation of the park, and a change in the use of the park, § 798.56(a)-(d), (f)-(g).

[3] *See* opinion of the court below, attached as Appendix A to the Petition for Certiorari, at 4.

[4] The Ordinance further provides that "[i]f a mobile home space is rented for the first time after January 1, 1986, the [park] owner shall not . . . [charge] rent for said space exceeding the rent first charged for the space." Section 3 of the uncodified ordinance, as reproduced in an attachment to Defendant City of Escondido's

to increase the rent, he must obtain approval from the City's Mobilehome Park Rental Review Board ("the Board"), which will hear evidence from both the park owner and the affected tenants and then "approve such rent increases as it determines to be just, fair, and reasonable." § 29-104. The Ordinance lists a number of factors which the Board shall consider in making its determination. *Id.*

Following passage of the Ordinance, petitioners John and Irene Yee ("petitioners"), the owners of a mobile home park in Escondido, filed a Complaint in the Superior Court of the State of California for the County of San Diego ("the trial court"). Petition for Certiorari 10-11. In the Complaint, they challenged the constitutionality of the Ordinance under the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I, § 19 of the California Constitution, alleging, among other things, "a taking of plaintiff's property for public use and benefit without payment of just compensation. . . ." Complaint, para. 10.

The City filed a Demurrer (motion to dismiss) and Motion to Strike. Petition for Certiorari 12. After a hearing, the trial court granted both motions, while denying leave to the petitioners to amend the Complaint. Order of Dismissal, attached as Appendix C to the Petition for Certiorari.

Petitioners then appealed to the Court of Appeal for the Fourth District, Division One ("the Court of Appeal"), which affirmed the order of the trial court. Petition for Certiorari 16; Appendix A to the Petition for Certiorari ("App. A"). In its opinion, the Court of Appeal acknowledged that "Escondido's rent control ordinance does not exist in a vacuum," but rejected petitioners' argument that the combined effect of the Ordinance and the Mobilehome Residency Law effected a "tak-

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Memorandum of Points and Authorities in Support of Demurrer to Plaintiffs' Complaint.

ing" of petitioners' property within the meaning of the Fifth Amendment. App. A, at 5, 6. While conceding that the Ordinance "effects a transfer of value from landlords to tenants," the Court of Appeal stated that as long as the controlled rents were "fair and reasonable," the transfer of value in question was "justified by a rational governmental purpose" and "[t]he fact that used mobile homes in Escondido are selling for more than they have in the past is irrelevant." App. A, at 13-14.

After the California Supreme Court denied petitioners' Petition for Review (*see* Appendix B to the Petition for Certiorari), petitioners then sought review in this Court.[5] Certiorari was granted on October 15, 1991.

SUMMARY OF ARGUMENT

1. The rent control provisions of the Ordinance, in conjunction with the restrictions that the Mobilehome Residency Law places upon park owners' right to evict current tenants (or refuse new ones), give tenants the right to occupy petitioners' property in perpetuity as long as they pay the controlled rent and refrain from violating applicable laws and regulations. Consequently, the Ordinance, together with the Mobilehome Residency Law, authorizes the "permanent physical occupation" of petitioners' property and effects a "taking" within the meaning of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court of Appeal, in the decision under review, failed to appreciate that it was the *combination* of the Ordinance and the Mobilehome Residency Law which effects a "taking" within the meaning of *Loretto*. The Court of Appeal also erred in concluding that petitioners, by renting their property to tenants *before* the Ordinance was enacted, had consented

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[5] *Amici* do not deal with the questions raised by petitioners' parallel action in the United States District Court for the Southern District of California, which is discussed in the Petition for Certiorari at 25-30.

to the permanent occupation of that property which the Ordinance now authorizes.

2. Under *Pennell v. City of San Jose*, 485 U.S. 1 (1988), a rent control ordinance violates the Due Process Clause if it is "demonstrably irrelevant" to its purpose of protecting tenants. Petitioners have stated a claim under the Due Process Clause by alleging that the effect of the Ordinance (in conjunction with the Mobilehome Residency Law) was to increase the price of used mobile homes, so that tenants purchasing used mobile homes after the enactment of the Ordinance may be financially no better off (or even worse off) than they would have been without the Ordinance. In addition, there is good reason to believe (and petitioners should have been allowed to prove) that the Ordinance will actually injure tenants' interests by aggravating housing shortages and creating financial impediments to the acquisition of used mobile homes. Petitioners' Due Process claim should not have been dismissed on the pleadings.

ARGUMENT

I. THE ORDINANCE, IN CONJUNCTION WITH THE MOBILEHOME RESIDENCY LAW, AUTHORIZES A PERMANENT PHYSICAL OCCUPATION OF PETITIONERS' PROPERTY AND IS THEREFORE A "TAKING" FOR WHICH THEY MUST BE COMPENSATED

As this Court held in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." Because the Ordinance and the Mobilehome Residency Law, operating together, grant tenants a *perpetual* right to occupy land owned by the petitioners—an interest which can actually be sold—the effect of those enactments is to give tenants a "complementary estate[]" in petitioners' land—analogous to an easement—and thus

to "take" petitioners' property within the meaning of *Loretto*. *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1276-1280 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988).

The Mobilehome Residency Law places stringent limits upon the rights of park owners to evict current tenants. § 798.56. And if current tenants sell their mobile homes to third parties, the park owner must accept the purchaser as a new tenant unless the purchaser is either unable to pay the rent or demonstrably unlikely to comply with the rules and regulations of the park. § 798.74. Standing alone, those provisions may not authorize a "permanent physical occupation" of the park owner's property, because the park owner may evict current tenants (or refuse to accept new tenants) who are unable to pay the rent fixed by the park owner. §§ 798.56 (e)(1), 798.74(a). However, with the addition of the Ordinance, which fixes rents at a specified level and prohibits any increase unless authorized by the Board (§§ 29-103, 29-104), park owners effectively lose the right to exclude either current or future tenants from the park. As the Ninth Circuit observed in discussing a similar ordinance, "tenants are given an indefeasible right to possession so long as they pay the controlled rent and behave themselves." *Hall*, 833 F.2d at 1277.

As this Court held in *Loretto*, it is irrelevant that the enactments in question authorize physical occupation of petitioners' property by private tenants, rather than the City itself. That was the situation in *Loretto*. As this Court there said: "A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." 458 U.S. at 432-433, n.9. Nor is it relevant that park owners may apply to local governmental authorities for a permit to change the use of the park. *See* Mobilehome Residency Law, § 798.56(g). They may well be unable to obtain such permits, and even if they can, this Court made it clear, in *Loretto*, that a landlord's ability to end the occupation of his property by ceasing

to rent it does not make that occupation any less a "taking."[6] Finally, it is also irrelevant, as the Ninth Circuit pointed out in *Hall*, that the Ordinance "might someday be repealed. A governmental taking can always be undone if the government so chooses. That has never defeated a taking claim." 833 F.2d at 1277.[7]

The Court of Appeal, in its decision below, held that there had been no physical taking of petitioners' property, within the meaning of *Loretto*, because (1) it did not believe that laws which permit a landlord to evict tenants only for "good cause" can effect a taking (App. A, at 18-19), and (2) it believed that in light of *F.C.C. v. Florida Power*, 480 U.S. 245 (1987), the fact that park owners originally elected to use their land for rental purposes meant that they had not been *compelled* to use it for such purposes. App. A, at 25-27. These contentions, however, are not adequate to support the court's conclusions.

The Court of Appeal held (App. A, at 18-19) that

> [i]f mobile home park tenants in Santa Barbara or Escondido possess any rights to "permanently occupy" the landlord's property, those rights derive not from a rent control ordinance but from the state Mobilehome Residency Law which limits the circumstances under which a landlord may terminate a tenancy, imposing a "good cause" standard. No case we are aware of has remotely suggested that such a regulation of the landlord-tenant relationship constitutes a compensable taking within the meaning of *Loretto*.

[6] "It is true that the landlord could avoid the requirements of [the statute at issue] by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439, n.17.

[7] For example, in *Loretto*, the fact that the offending statute could have been repealed at any time did not prevent this Court from finding "a permanent physical occupation authorized by government. . . ." 458 U.S. at 426.

But petitioners here have not argued that requiring them to have "good cause" for evicting tenants would, in and of itself, authorize the "permanent physical occupation" of their property. Clearly, it would not (and there will be no cases suggesting that it would) because no tenant remains forever. Rather, as explained above, it is the *combination* of restrictions on evicting current tenants (§ 798.56 of the Mobilehome Residency Law), restrictions on refusing to accept *new* tenants (§ 798.74 of the Mobilehome Residency Law), *and* rent control (§§ 29-103 and 29-104 of the Ordinance) which, together, have effected a "permanent physical occupation" of petitioners' property. Every federal court of appeals which has considered the issue has held that such restrictions, in combination, do constitute a physical "taking" of property within the meaning of *Loretto*. *Hall, supra; Pinewood Estates v. Barnegat Township Leveling Bd.*, 898 F.2d 347 (3d Cir. 1990); *Azul Pacifico, Inc. v. City of Los Angeles*, 1991 U.S. App. LEXIS 26335 (9th Cir. 1991).[8]

The Court of Appeal below further held that under *F.C.C. v. Florida Power, supra*, " 'the element of *required acquiescence* is at the heart of the concept of occupation' "

[8] The Court of Appeal below asserted that "[s]imilar ordinances have repeatedly withstood challenges alleging facial unconstitutionality," citing *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261 (1984), *appeal dismissed* 471 U.S. 1124 (1985), and *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 350 A.2d 1 (1975). App. A, at 21. However, in *Fisher*, neither the appellants (in their Jurisdictional Statement) nor the California Supreme Court addressed the issue as to whether a "physical taking" had occurred. *Loretto* was not even mentioned. Similarly, in *Hutton Park* (which was decided prior to *Loretto*), the New Jersey Supreme Court did not discuss the "physical taking" issue. And *Pennell v. City of San Jose*, 485 U.S. 1 (1988), which the Court of Appeal relied upon to demonstrate that this Court has upheld the constitutionality of similar enactments (App. A, at 10), involved a rent control ordinance which did *not* restrict the landlord's right to increase the rent upon the departure of the current tenant. 485 U.S. at 5, n.2.

and that because petitioners have not been "required to acquiesce in the occupation of some or all of their property by third persons . . . ," petitioners' property has not been taken within the meaning of *Loretto*. App. A, at 25-27. (Emphasis in original). However, in *Florida Power*, the statute in question merely regulated the rent that utility companies could charge for the use of their poles and did *not* require them to let others use those poles. 480 U.S. at 251. The Court expressly reserved the issue as to whether *Loretto* would apply "if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." 480 U.S. at 251-252, n.6. In the present case, while petitioners may originally have elected to use their property for rental purposes, the passage of the Ordinance has effectively required them to "renew, or refrain from terminating" that arrangement and thus comes squarely within the ambit of *Loretto*.

In short, it is clear that the Ordinance, as it operates in conjunction with the Mobilehome Residency Law, has authorized a "permanent physical occupation" of petitioners' property within the meaning of *Loretto* and is therefore a "taking" for which the Takings Clause requires "just compensation."

II. THE TRIAL COURT ERRED IN DENYING PETITIONERS THE OPPORTUNITY TO PROVE THAT THE ORDINANCE IS "DEMONSTRABLY IRRELEVANT" TO THE PURPOSES THAT IT WAS DESIGNED TO SERVE AND THEREFORE VIOLATES THE DUE PROCESS CLAUSE

As this Court held in *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988), state price-control regulations are unconstitutional, under the Due Process Clause, "'if [those regulations are] arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is

free to adopt.'"[9] In the present case, petitioners have alleged (but were denied the opportunity to prove) that the Ordinance, in conjunction with the Mobilehome Residency Law, not only deprives them of property, but is "demonstrably irrelevant" to the purposes for which it was enacted and may actually *frustrate* those purposes. *See, e.g.*, Complaint, paras. 7-8 (alleging that the effect of the Ordinance was to increase the price of used mobile homes); Points & Authorities in Opposition to Demurrer, at 14-16 (arguing that the Ordinance "is not reasonably related to the effectuation of a substantial government purpose").

As the Court of Appeal below acknowledged, "[n]o one can dispute that Escondido's rent control ordinance . . . effects a transfer of value from landlords to tenants." App. A, at 13-14. The imposition of rent control reduces the expected rental income from the property and thus lowers its resale value.[10] "The critical question is whether such a transfer can be justified by a rational governmental purpose . . . ." App. A, at 14. But while the purpose of rent control is to *protect* the interests of tenants,[11] the order of the trial court has prevented petitioners from proving that the Ordinance, in conjunction with the Mobilehome Residency Law, actually *impairs* the interests of purchasing tenants by increasing their costs and transferring the benefit to the sellers of mobile homes who leave them on the premises.

First, as petitioners have alleged, and are prepared to show, tenants selling their mobile homes are able to charge the purchasers for the privilege of secure tenure

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[9] Citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 769-770 (1968).

[10] Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399, 423-424 (1988).

[11] *Pennell*, 485 U.S. at 13.

at controlled rents, and are able to collect that charge by adding it to the price of the mobile home. As the Third Circuit recently explained in discussing a similar ordinance:

> a tenant [selling his or her mobile home] . . . may command a premium for the alienation of the right to occupy the pad at a controlled rent to the complete exclusion of the [park owners]
>
> * * * *
>
> The premium can be extracted because of the absence of vacancy decontrol for if there were no controls the park owners would, at least in theory, increase the rents to the level that would eliminate the willingness of a new purchaser to pay a premium to locate the mobile home in the park.

Pinewood Estates, 898 F.2d at 353. *See also Hall*, 833 F.2d at 1276 (same); Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399, 425 (1988) (pointing out that "when rent controls are imposed, the value of [mobile home] coaches owned by sitting tenants increases" and that "[t]his increase results from the capitalization of the rent control ordinance which has reduced pad rents for the foreseeable future").[12]

Indeed, a recent study of mobile home sales in forty California cities indicates that any tenant who purchases a mobile home in a mobile home park *after* the enactment

[12] This case is therefore quite different from *Pennell, supra*, which involved rent controls on apartment buildings. With apartment (as opposed to mobile home) rent control, the outgoing tenant cannot charge the incoming tenant a "premium" for the privilege of having rent control. *Pinewood Estates*, 898 F.2d at 355; Hirsch & Hirsch, 35 UCLA L. Rev. at 425; *Hall*, 833 F.2d at 1278 (distinguishing this Court's prior rent control cases on that basis). Moreover, in *Pennell*, there were no restrictions on the rent that the landlord could charge the incoming tenant. 485 U.S. at 5, n.2. Thus, the outgoing tenant had nothing to sell.

of a rent control ordinance can expect to pay approximately 32% more than he or she would have had to pay *prior* to the enactment of the ordinance. Hirsch & Hirsch, 35 UCLA L. Rev. at 443. Consequently, "after the institution of rent control, a resale tenant may have lower rent payments, but higher mortgage payments for exactly the same quality and quantity of housing that existed before rent control." *Id.* at 448. The result may well be (and petitioners should have been given the chance to prove) that tenants who purchase mobile homes after the enactment of the Ordinance are no better off financially—or even worse off—than they would have been without rent controls. Moreover, even if incoming tenants do not actually suffer financial loss as a result of the Ordinance, a significant increase in the price of used mobile homes "may well hinder rather than assist lower-income families seeking . . ." to obtain such homes. *Hall*, 833 F.2d at 1281.

Second, the history of the impact of mobile home rent controls in California bears out the prediction of standard economic theory that rent control ordinances will cause a reduction in the quality and quantity of available rental housing.[13] As Hirsch and Hirsch have pointed out,

> [s]ince the imposition of mobile home rent controls in California, *virtually no new parks and pads have been constructed. Whereas 60% of all mobile home park spaces in existence today were constructed between 1960 and 1970, only 4% of total mobile home park spaces have been constructed since 1980 when mobile home rent controls began in earnest.* The fact is that very few new mobile home parks are being developed and a major reason appears to be the severity of mobile home rent controls.

Hirsch & Hirsch, 35 UCLA L. Rev. at 463. (Emphasis added; footnote omitted). If the effect of the Ordinance has indeed been to reduce the amount of mobile home

[13] *See Hall*, 833 F.2d at 1281, n.26.

spaces available, that result will not "benefit" the tenants that the Ordinance was designed to protect.

In short, petitioners should have been given the opportunity to prove that the Ordinance, which takes valuable property interests from them, is "demonstrably irrelevant" and even antithetical to the purposes for which it was enacted. Petitioners have therefore stated a claim under the Due Process Clause, and the trial court erred in granting the City's Demurrer.

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the briefs of petitioners and other *amici*, the decision of the Court of Appeal should be reversed, with appropriate instructions to the trial court.

Respectfully submitted,

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November 1991